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No. 559.

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In the Supreme Court of the United States

October Term, 1932.

CITY OF HARRISONVILLE, MISSOURI, *Petitioner,*

vs.

W. S. DICKEY CLAY MANUFACTURING COMPANY, *Respondent.*

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

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RESPONDENT'S ADDITIONAL STATEMENT OF THE CASE.

The decree of which petitioner complains is based upon a finding by the trial court, affirmed by the Eighth Circuit Court of Appeals, that the sewage disposal facilities now operated by the City of Harrisonville create an *unnecessary* nuisance in Town Creek, a small watercourse running through about one hundred acres of respondent's wooded blue grass pasture land (R. 177).

The evidence of witnesses on both sides of the case shows that the City of Harrisonville (population 2,073) collects its sewage through collecting mains, and deposits it in an Imhoff tank (Exhibit 1, point "A," R. 142); that from this Imhoff tank the sewage is piped under the right-of-way of the defendant, Missouri Pacific Railroad, and flows therefrom into a watercourse upon the land of the respondent (Exhibit 1, point "B," R. 142; R. 36).

The evidence on both sides is undisputed that an Imhoff tank is merely a primary method for the reduction of sewage matter, and at best will not remove more than 55% to 60% of the putrescible matter from sewage (R. 50, 51, 83, 87; Chief Public Health Engineer for the Missouri State Board of Health, R. 63, 64).

Likewise testimony on both sides is undisputed that it was possible at the time the City of Harrisonville built its Imhoff tank (1923), and is still possible, to treat sewage in such a way that the effluent will not create a nuisance in a small watercourse, such as the stream upon the respondent's land (R. 51, 52, 84; Chief Public Health Engineer for the Missouri State Board of Health, R. 63, 66). The health engineer testified that he had officially recommended such treatment by the City of Harrisonville in a report to the City of Harrisonville in the year 1925 (R. 64). He gave the names of ten other towns in the State of Missouri of approximately the size of Harrisonville, some slightly smaller and some slightly larger, in which adequate sewage treatment has been provided (R. 52, 64). The health engineer testified that by the treatment used at these places the effluent from the disposal plant could be discharged into a watercourse no larger than the stream in question without creating a nuisance (R. 66); that in such a watercourse "the same

size or a little smaller than Town Creek, the stream below the point of discharge was clear, the bottom of the stream clear, and the water in good condition with no such deposits," as contained in Town Creek below the sewage outlet (R. 64).

The health engineer testified that the treatment given in the sewage disposal plant at the City of Harrisonville was "insufficient" (R. 66).

Testimony of the engineer for the respondent tended to prove that even the existing Imhoff tank as a primary disposal plant was inadequate in size; that its sludge digestion chambers were probably capable of taking care of a population of 1,000 (R. 51), whereas the population of Harrisonville is 2,073, and 1,200 to 1,500 persons were probably using the Harrisonville sewers in the fall of 1928 (R. 51); that raw sewage was passed directly from the main line of the sewer to the stream by a by-pass without being treated at all in the Imhoff tank (R. 51); that either due to a defect in design or operation, excessive odors of hydrogen sulphite were noticeable (R. 51); that there was septic action in the settling compartments (R. 51); grass, weeds and tomato plants were growing in the sludge bed and in the sludge and gas vent compartment of the tank (R. 51); some improvement had been made in this last respect, but without effect upon the maximum reduction of putrescible matter passing through the tank (R. 51).

Respondent's land through which the contaminated creek meanders is "bottom blue grass wooded pasture" suitable for pasturage, except for the contaminated water, and not used or suitable for other purposes (R. 36).

Town Creek, prior to the discharge therein from the city's sewage plant, was comparatively clear; one could see the bottom; the banks were free of discoloration (R.

37); the water in the creek was "good water to supply cattle"; the cattle drank it; there was no odor; the water was clear, except after a rain (R. 55); before the sewer plant was built "this creek (Town Creek) used to be as nice a little creek as you would want"; the water was fine; there were "lots of fish there" (R. 56-60). The Missouri State Health Engineer testified that above the sewer outlet the creek is "in about the condition you would expect a creek of that sort, apparently clear," and even in a dry period "when the flow is very moderate, the water is fairly clear" (R. 62, 63).

Experts applying various tests, including the dissolved oxygen test, the bio-chemical oxygen demand test, and bacteria counts, found gross pollution in the creek below the sewage outlet (R. 48, 49, 85, 136, 137).

The respondent in the trial below introduced no evidence as to damage to the value of the land, since the purpose of the suit is to enjoin an *unnecessary* nuisance. The respondent did introduce at the trial evidence of loss of rents during the period the nuisance has continued (R. 42, 44, 45, 55, 61).

THE PETITION AND BRIEF DO NOT COMPLY WITH THE RULES.

Petitioner's brief contains no statement of the grounds on which the jurisdiction of this court is invoked as required by 1 (c), Rule 27.

Petitioner's brief contains no specification of such of the assigned errors as are intended to be urged as required by 1 (e), Rule 27.

PETITIONER HAS STATED NO REASON JUSTIFYING A WRIT OF CERTIORARI.

(A) No Federal question is involved.

It is obvious from a reading of the petition and brief that the case does not involve the validity of any statute of the State of Missouri under the Constitution, treaties or laws of the United States; nor any federal question arising under the laws or Constitution of the United States.

(B) The question of what constitutes a temporary as distinguished from a permanent nuisance does not call for the exercise of the jurisdiction of the Supreme Court of the United States.

The petitioner's petition is that the sewage disposal plant in question constitutes a permanent nuisance, and that therefore the respondent was not entitled to an injunction against this nuisance. The petitioner's view is that respondent should have sued for damages to the

value of respondent's property, caused by the permanent nuisance, and that the awarding of such damages would confirm the right of the city to continue the maintenance of the nuisance.

It is to be borne in mind that petitioner, the City of Harrisonville, did not condemn a right to project the sewage of the city into the watercourse on plaintiff's land (R., p. 7). However, even if the city had secured such a right by condemnation, the respondent's position would have been the same. That position is that no municipality has a right to so dispose of its sewage as to create an *unnecessary* nuisance. The record demonstrates, and petitioner admits, that adequate treatment of sewage, such as is commonly in use in many towns of similar size, would relieve the nuisance (R., pp. 63, 50). Petitioner says, however, that it has a right to construct any type of sewage disposal plant it may see fit, however inadequate, and project the effluent therefrom onto respondent's land, and then say to respondent that there is no relief except damages. If this position were sound, then the city need not have gone to the trouble of erecting any disposal plant whatever; it might just as well have collected its sewage into one main line and let the outfall from that line into the watercourse on respondent's land. The city could then have said, with as much force as it says now, that the damage from a sewage system of that kind would be permanent rather than temporary, and the respondent would have no right except damages.

It is true that a municipality has a right by condemnation to acquire the use of natural watercourses for the disposal of sewage, but it is equally true that this power of condemnation, whether exercised by a municipality or

by private corporations vested with power of eminent domain, does not include the right to so use the facilities involved as to create a nuisance where methods are available to avoid the nuisance. This is the applicable local law in Missouri, firmly established by Missouri cases.

Mining Co. v. *City of Joplin*, 124 Mo. 129, 27 S. W. 406 (1894):

This is a leading case holding that, under the Missouri statutes, a stream may be used by a city for sewage disposal. The court found that the sewer in question did *not* create a nuisance and that it was, therefore, unnecessary to decide the question of the right of the city to maintain a nuisance (l. c. 136):

> "Whether the city can do this so as to create a public nuisance we need not inquire, for in our opinion the evidence makes out no such a case."

The court defines the limitations upon the power of the city as follows:

> "The proprietor of land through which a stream flows cannot insist that the water shall come to him in the natural pure state. He must submit, and that, too, without compensation, to the reasonable use of it by the upper proprietors; and he must submit to the natural wash and drainage coming from towns and cities. *But a city has no right to gather its sewage together and cast it into a stream so as to injure the lower proprietor. For damages thus sustained, the lower proprietor will have an action, and in many instances injunctive relief.*" (Citing cases.) (Italics ours.)

Swanson et al. v. *Bradshaw,* (Mo. App.) 187 S. W. 268 (1916) (not officially reported):

This was a suit in equity to enjoin the further maintenance of a nuisance consisting in the use of defendant's land outside the City of Springfield for disposing of the garbage and dead animals collected from the city. The defendant was operating under a contract with the city. The evidence of nuisance was held sufficient to sustain plaintiff's right to a perpetual injunction.

The court said (l. c. 269):

> "It is true that the garbage of the city must be taken care of and that defendant is engaged in a lawful and useful business. The evidence shows, however, that by some increased expense this garbage can be disposed of in a far more safe and sanitary way. The health officers of the city, both by report to the city and by oral evidence, pronounce the present method as improper and unsanitary. Even if defendant was using an approved method and was disposing of the garbage in a careful manner, this fact would not justify his interference with the reasonable and comfortable enjoyment by another of his property or his causing material injury thereto. Joyce on Nuisances, Sec. 167."

Scott v. *City of Marshall,* 223 Mo. App. 596, 14 S. W. (2d) 694 (1929):

This case was an action in two counts; first at law for damages, and second in equity for a mandatory injunction. Plaintiffs were the owners of property in Marshall, Missouri. The petition alleged that the city in constructing a sewer drain destroyed a natural watercourse so as to throw flood waters upon the premises of plaintiffs, depositing silt, manure and other filth and debris on

plaintiffs' premises. Upon the second count, the court rendered a mandatory injunction enjoining the city from maintaining and continuing the nuisance and ordering the city to abate said nuisance and to return and restore the watercourse to its natural condition as it was before the construction and erection of the sewer. On appeal the court said:

> "Finally, it is urged the court erred in finding for plaintiffs and granting them an injunction under the second count of the petition. Under the evidence adduced at the trial on the first count, the court reasonably could find that the floods deposited silt, manure and other filth and debris on plaintiffs' premises, that the situation created a nuisance which the trial court had jurisdiction to abate."

The same principle has been announced by the Supreme Court of the United States.

Baltimore, Etc., R. R. Co. v. *Fifth Baptist Church,* 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739 (1883):

In this case, which is cited in *Edmondson* v. *City of Moberly,* 98 Mo. 523, 11 S. W. 990 (1889), a railroad under statutory authority built its shops and roundhouse next to a church. The case is frequently cited as showing the limitations upon the exercise of powers conferred by legislative authority. This language is to be noted, l. c. 331:

> "In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. * * *
>
> Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that

> the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion."

The rule is well stated by the Supreme Court of Oklahoma.

The City of Oklahoma City, Oklahoma, v. *W. C. West,* 155 Okla. 63, 7 Pac. (2) 888 (1931):

In this case suit was brought to recover damages caused by discharge of unpurified sewage into a watercourse with resultant injury to the riparian owner. The right of the riparian owner to damage was sustained. The court held that the damages were caused not by a permanent structure, but rather by the manner of sewage disposal which the city had adopted. The court took judicial notice of the fact that sewage can be easily and successfully purified, so that a nuisance caused by discharge of unpurified sewage into a watercourse is merely a temporary nuisance which can be abated by the expenditure of money or labor. The court further held that it is not within the power of a municipality which is discharging unpurified sewage into a watercourse to the damage of a riparian owner to leave a riparian owner merely to his damages as for a permanent nuisance.

The court said:

> "A nuisance of this character, by discharging pollution into a stream, is not caused by a so-called per-

manent structure, but is caused by the manner in which the structure is used. We have repeatedly held such a nuisance to be temporary under the rule that where a nuisance can be abated by the expenditure of money or labor, it shall be considered temporary. These decisions, so far as pollution is concerned, may be based upon a hitherto unannounced application of the doctrine of judicial notice, and that the real rationale of the decisions may in the future be fully apparent, we announce that this court takes judicial notice of the fact that modern science has advanced to the point where sewage is capable of purification, and that it is not only capable of purification, but can be easily and successfully purified by the use of modern appliances. *Bennett* v. *City of Marion*, (Iowa) 93 N. W. 558 (1903). 'Indeed the purification is coming to be regarded as a necessity.' *Platt Bros. & Co.* v. *City of Waterbury*, 72 Conn. 531, 67 Atl. 508 (1900). We hold it to be necessary."

Other general law to exactly the same effect will be found in the following cases:

Jones v. *Sewer Improvement Dist. No. 3*, 119 Ark. 166, 177 S. W. 888 (1915).
Morse v. *City of Worcester*, 139 Mass. 389, 2 N. E. 694 (1885).
Chapman v. *City of Rochester*, 110 N. Y. 273, 18 N. E. 88 (1888).
Carmichael v. *City of Texarkana*, (C. C. W. Dist. Ark.) 94 Fed. 561 (1899).
City of Tecumseh v. *Deister*, 112 Okla. 3, 239 Pac. 582 (1925).
Harbison v. *City of Hillsboro*, 103 Ore. 257, 204 Pac. 613 (1922).
Sewage District No. 1 v. *Black*, 141 Ark. 550, 217 S. W. 813 (1920).

(C) The injunction in the case at bar does not command the legislative function of the municipality.

Petitioner argues that the injunction in the case at bar in effect requires the city to build an additional sewage disposal plant at a specified cost. This is not correct. The State Health Engineer testified that in 1925 he had recommended to the City of Harrisonville additional treatment of its sewage (R. 63, 64). The expert engineer testifying for plaintiff below named sand filters, trickling filters, or activated sludge as possible types of treatment which would eliminate the nuisance in question (R. 50, 51). He also pointed out inefficient and ineffective operation of the existing plant at Harrisonville (R. 51). None of the witnesses stated that any one particular system was necessary. The injunction requiring the abatement of the nuisance specifies no particular action which the city must take (R., p. 15). Petitioner concedes that a court has the right to enjoin the nuisance (Petitioner's Brief, p. 22); but complains that the court does not have the power to compel the city to build a definite type of disposal plant. The short answer to this is that the court has not ordered the city to do any specific act. True, under the decree the city must cease the "discharge of putrescible sewage matter" into the watercourse in question. Any number of methods are available to the city to comply with that injunction; it may pipe its sewage elsewhere, or utilize any of the several successful methods in common use for so reducing the sewage that the outflow will be non-putrescent. It may even abandon the sewer system and return to the method of private disposal by each householder if it feels that it must choose between that and maintaining *unnecessarily* a

system which dumps the entire sewage accumulation of the city upon the private property of the respondent.

(D) The financial powers of the city are not pertinent to determination of the petition for writ of certiorari.

The petitioner argues that the power of the city to raise funds by issue of bonds is limited to the sum of $12,583.00 (Petitioner's Brief, p. 51); also that although the city has statutory power to pay for sewage disposal plants by general revenue, yet such revenues are needed for other purposes; also that although there is statutory power to pay for sewage systems by special assessments, yet such a method would not be applicable to a disposal plant. These considerations are not applicable on a petition for writ of certiorari. They have been held inapplicable on the merits in a number of the cases cited above for the proposition that a city may not maintain an unnecessary nuisance. Furthermore, petitioner's argument under this head is based upon the false assumption that the decree below requires the city to spend a specified sum of money.

(E) A question of balanced equities is not pertinent to a petition for writ of certiorari.

Petitioner argues that the record in the case at bar shows a small amount of damage to respondent. It is to be borne in mind that respondent in the trial below introduced no evidence as to the value of the land in question. It did introduce evidence as to actual loss of rents (R. 42, 44, 45, 55, 61). Petitioner offers to compare this loss of rents over a period of a few years preceding the trial with what petitioner assumes will be the

cost of constructing a different disposal plant. This is an attempt to present in this court the question of whether the court below should have exercised a discretion based upon a comparison of plaintiff's damages with the inconvenience which an injunction would cause to the defendant. There is no showing in the petition whether the point was raised below. However that may be, such a consideration is not one affecting the discretion of the Supreme Court of the United States on a matter of certiorari. Furthermore, the petitioner again indulges in the false assumption that the decree requires the city to expend a specified sum of money to perform specific acts.

Respectfully submitted,

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